

1 Servicing Corp. (“NDSC”) filed the Notice of Default (“NOD”) based on a default of \$78,475.70
2 as of March 9, 2009. (*See* NOD, Mar. 9, 2009, ECF No. 9-2). NDSC noticed a trustee’s sale for
3 December 3, 2009, (*see* First Notice of Sale (“NOS”), Nov. 5, 2009, ECF No. 9-4), again for
4 April 15, 2010, (*see* Second NOS, Mar. 11, 2010, ECF No. 9-5), and again for December 2,
5 2010, (*see* Third NOS, Oct. 28, 2010, ECF No. 9-7). Plaintiff petitioned for Chapter 13
6 bankruptcy in this District on July 21, 2010, but the bankruptcy judge dismissed the petition on
7 October 15, 2010. (*See* Docket in Case No. 10-bk-52870-GWZ, ECF No. 9-6).

8 **II. ANALYSIS**

9 Although the affirmative claims fail for reasons explained elsewhere in substantively
10 identical cases, there may have been a statutorily defective foreclosure in this case. There is no
11 evidence the foreclosing entity was the trustee or other agent of the beneficiary when it filed the
12 NOD. Although MERS may transfer the beneficial interest if, as here, the DOT indicates an
13 intent to give it this agency, *see Smith v. Cmty. Lending, Inc.*, 773 F. Supp. 2d 941, 943–44 (D.
14 Nev. 2011); DOT 3, and a beneficiary who proceeds to a trustee’s sale after a purported trustee
15 files an NOD before it has in fact become the trustee may thereby ratify the filing, *see Nevada ex*
16 *rel. Bates v. MERS*, No. 3:10–cv–00407–RCJ–VPC, 2011 WL 1582945, at *5 (D. Nev. Apr. 25,
17 2011) (citing Restatement (Third) of Agency § 4.03 & cmt. b), in this case NDSC could not have
18 purported to have been acting for Wachovia when it filed the NOD, because MERS had not yet
19 transferred the beneficial interest to Wachovia, (*compare* NOD, Mar. 9, 2009, *with* Assignment,
20 Nov. 4, 2009).

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1 **CONCLUSION**

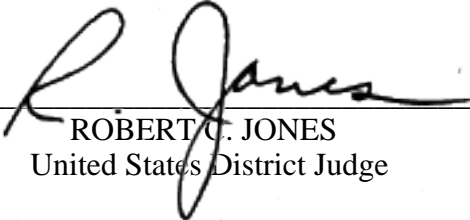
2 IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 8, 11) are
3 GRANTED in part and DENIED in part. All claims are dismissed except that for statutorily
4 defective foreclosure under section 107.080(2)(c).

5 IT IS FURTHER ORDERED that Defendants will not sell the Property for one-hundred
6 (100) days. During this period, Plaintiff will make full, regular monthly payments under the note
7 every thirty (30) days, **with the first payment being due ten (10) days after the date of this**
8 **order.** The amount of each payment will be according to the monthly payment as of the date of
9 the NOD. **Payments will be made either to the current servicer or deposited with the Clerk.**
10 Failure to make interim payments during the injunction period will result in dissolution of the
11 injunction. Plaintiff need not pay late fees or cure the entire amount of past default at this time.

12 IT IS FURTHER ORDERED that during the injunction period the parties will engage in
13 the state Foreclosure Mediation Program ("FMP"), if available. If not available, Defendants will
14 conduct a private mediation with Plaintiff in good faith. Although such private mediation need
15 not comport with all of the procedural and documentary requirements of the FMP, the
16 beneficiary must send a representative to the mediation with actual authority to modify the note,
17 and Plaintiff must provide debt, asset, and income data to Defendants in advance of the
18 mediation.

19 IT IS SO ORDERED.

20 Dated this 19th day of September, 2011.

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23 ROBERT C. JONES
24 United States District Judge
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